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No. 14-275

In the
Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES
DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS AND REVERSAL

*J. DAVID BREEMER
Counsel of Record
JAMES S. BURLING
JENNIFER F. THOMPSON
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3, Pacific Legal Foundation (PLF) respectfully files this amicus curiae brief in support of Petitioners Marvin D. Horne, et al.[1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have often participated as lead counsel or amicus curiae in this Court in defense of the right of individuals to make reasonable use of their property, and to seek and obtain redress when that right is infringed. *See, e.g., Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). More particularly, PLF attorneys served as lead counsel in the landmark case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), defining the scope of the government's authority to impose exactions on land use permits, and in the more recent case, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), affirming that the Takings Clause protects money, as well as real property, in land use permitting transactions. Both *Nollan* and *Koontz* are implicated

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

by the Ninth Circuit decision at issue here, and PLF believes that its familiarity with these cases—and constitutional takings law in general—will assist the Court in considering the federal takings issues in this case.

SUMMARY OF ARGUMENT

At its core, the lower court's decision in this case holds that the federal government did not take private property when it applied a "marketing order" (Order) requiring the Hornes to hand over a large portion of their raisin crop or a large part of their savings. In reaching this result, the Ninth Circuit concluded that the government's demands were judged under the "essential nexus" and "rough proportionality" exaction standards of *Nollan*, 483 U.S. at 837-39, and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), rather than the per se standard applicable to physical takings. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1141-42 (9th Cir. 2014) (rejecting applicability of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). The lower court held that the Order satisfied the Takings Clause under the *Nollan/Dolan* tests because it reasonably advanced the government's regulatory goals. *Horne*, 750 F.3d at 1143-44.

This was incorrect. *Nollan* and *Dolan* do not apply to the taking presented in this case. In *Nollan*, this Court made clear that the "essential nexus" framework applies to a taking caused by a property use condition *only when* the government could lawfully deny the proposed property use outright. If the government could deny the use, then it could allow the use subject to some exaction condition that might otherwise be a taking—as long as the condition is appropriately tailored. But if the government could *not*

constitutionally deny the proposed use, then any exaction is reviewed under traditional takings standards as an independent burden on property rights.

This case reflects the latter principle. Here, unlike in *Nollan*, the Court cannot assume that the government could constitutionally ban the Hornes from the property use the government seeks to regulate —farming and sale of raisins, a beneficial, non-nuisance agricultural product. Multiple constitutional doctrines stand in the way of such an assumption. Therefore, the Order is not one of those property use conditions subject to *Nollan* and *Dolan*. Instead, it is an outright governmental demand to forfeit property, and should be adjudicated as such under a per se takings analysis. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 ("'[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" (quoting *Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002))); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3-4 (1949) (applying a per se analysis to seizure of a business). Indeed, to apply *Nollan* and *Dolan* here risks converting every regulation causing a physical appropriation of property into a mere "condition" on some activity whose constitutionality is determined by the *Nollan/Dolan* "nexus" and "rough proportionality" tests rather than the easily understood per se inquiry. The Court should not inject such confusion into takings law.

Finally, even if the Court found *Nollan* and *Dolan* relevant to this case despite the absence of the necessary predicates, the Ninth Circuit's

understanding of the "essential nexus" and "rough proportionality" tests is inadequate. *Nollan* and *Dolan* do not simply ask whether an exaction advances a particular government goal. They include an important causation element that requires the government to show that the regulated property use *directly causes* the problem an exaction addresses and, if so, that the exaction is proportionate to that impact. *Koontz*, 133 S. Ct. at 2591, 2595. The Ninth Circuit's reasoning did not include this essential analysis and should therefore not be followed.

ARGUMENT

I

NOLLAN/DOLAN GOVERN PROPERTY USE CONDITIONS ONLY WHEN THE GOVERNMENT COULD LEGITIMATELY FORBID THE REGULATED USE OUTRIGHT; SINCE THAT PREDICATE IS ABSENT HERE, *NOLLAN/DOLAN* DO NOT APPLY

The standards for determining whether an invasion of property rights violates the Constitution generally vary depending on whether it occurs through a physical or regulatory imposition. Government actions tantamount to a physical invasion or occupation, like those that take possession of private property, are subject to a strict, per se test that automatically requires the government to pay just compensation. Regulatory restrictions on property that deny a property owner all economically beneficial use of property are also subject to a per se test. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-19 (1992). Lesser regulatory impositions are

subject to the multi-factor test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Then there is a third category of tests that are not, strictly speaking, takings standards at all, but a "special application of the 'doctrine of 'unconstitutional conditions.' " *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan*, 512 U.S. at 385). Articulated in *Nollan* and *Dolan*, these tests govern in place of traditional takings tests in certain cases where the government exacts property interests as a condition of property use. The Ninth Circuit utilized the *Nollan/Dolan* tests to resolve this case, but it was wrong.

A. The *Nollan* and *Dolan* Tests Have Limited Applicability

1. The Basics of *Nollan* and *Dolan*

In *Nollan*, property owners sought a permit to build a beach home. 483 U.S. at 828. When the Coastal Commission demanded that they dedicate an easement across their beach front yard to the public to obtain approval, the Nollans challenged the condition as a taking. This Court held the condition unconstitutional because there was an insufficient connection between the condition and any negative social impact arising from the Nollans' house. *Id.* at 837-39. Without this "essential nexus," the permit condition was "quite simply, the obtaining of an easement without payment of compensation." *Id.* at 837. *Nollan* thus established that, in some cases, a taking arising from a property use condition is unconstitutional without a clear link between the condition and the impacts of the property.

In *Dolan*, this Court considered how close a fit there must be between a permit exaction and the potential negative impacts of the regulated property. The case involved exactions imposed on Florence Dolan's plan to expand her plumbing and electrical supply store. The government specifically demanded easements for a storm drainage system and public pathway as a condition of approving the expansion. 512 U.S. at 379-80. Although these exactions satisfied *Nollan*—because the easements mitigated the effects of the enlarged store in potentially causing increased flooding and traffic—the *Dolan* Court held that such a connection alone was insufficient to constitutionalize the conditions. *Id.* at 391. The Fifth Amendment also required the government to make an individualized determination showing the exactions are "roughly proportionate" to the impact of the property owner's proposed development. *Id.* The City failed to do so in *Dolan*.

Thus, the rule arising from the *Nollan* and *Dolan* decisions is that the government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 133 S. Ct. at 2595. The Court has repeatedly made clear that these are land use condition tests, not general takings standards. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."). This does not mean, however, that *every* condition that seeks to exact property is a

Nollan/Dolan issue. Certain predicates must exist before the "nexus" and "rough proportionality" tests control over traditional standards like the per se physical takings test.

2. *Nollan/Dolan* Apply to a Taking Arising from a Property Use "Condition" Only When the Government Could Deny the Regulated Use Outright

To understand the limits of the *Nollan/Dolan* framework, it is necessary to more closely review the property restriction at issue in *Nollan*—a public access easement. Although the *Nollan* Court recognized that a taking of such an encumbrance is typically a per se physical taking,[2] it analyzed the encumbrance under the "essential nexus" test, rather than the strict, categorical test. Casual readers may conclude this was because the easement exaction in *Nollan* was imposed as a permit condition rather than as a straightforward seizure. But this is too facile. The Court's refusal to treat the easement demanded from the Nollans as a textbook physical taking rests on a different, deeper predicate.

That predicate is the assumption that the Commission could constitutionally deny the Nollans' home outright if it interfered with the agency's presumably legitimate public beach access goals.[3] It is

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[2] *See* 483 U.S. at 831 (citing *Loretto*, 458 U.S. at 433, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

[3] The *Nollan* Court could apparently assume that the Commission's outright denial of the proposed home would not cause a taking because there was already a pre-existing, smaller

(continued...)

this premise that led the Court to conclude that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking" under traditional tests, "*if the refusal to issue the permit would not constitute a taking.*" 483 U.S. at 835-36 (emphasis added). In other words, a use condition that takes property for a legitimate purpose is not analyzed under normal takings rules *if* the condition allows a use that could be legitimately denied for the same purpose. *Id.* at 836-37.

The Court explained this principle by considering several hypothetical conditions that might have been imposed on the Nollans to advance public beach access goals, including "a [public] viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. Like an easement, such a viewing spot would normally be considered a per se physical taking, but that character disappeared if the Commission could deny the Nollans' proposed home:

> Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's *assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession*

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[3] (...continued)
home on the Nollans' lot, with which denial would not have interfered.

> *by the owner, even a concession of property rights, that serves the same end.*

Id. (emphasis added).

Nollan went on to hold that constitutional limits remain even in this outright denial context. Specifically, while the per se test may not apply, an exaction must still be tailored to the social impacts caused by the subject property—there must be an "essential nexus." *Id.* at 837.

The bottom line is that *Nollan* articulated the "essential nexus" test only for some property exactions—those imposed to authorize property uses that could be otherwise completely denied. *Id.* If this predicate is missing, standard takings tests will apply even to a condition that seeks to exact private property. *Id.*; *see also*, Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1610-12 (1988) (explaining that the difference between the per se test applied to the physical taking in *Loretto* and the "essential nexus" test applied to that in *Nollan* is that in *Loretto*, it would have been a taking for the government to totally deny the regulated property use-rental of the building).

B. The Physical Takings Imposed by the Marketing Order Are Not Subject to *Nollan* and *Dolan*

In this case, the Ninth Circuit applied *Nollan* and *Dolan* after reaching the questionable conclusion that the Order functions as a condition on the Hornes' right to produce and sell raisins. *Horne*, 750 F.3d at 1143. Even taking this conclusion at face value, it fails to justify application of *Nollan* and *Dolan* because it skips over the critical question of whether the government

could prohibit the Hornes' activities altogether. The logic also fails because it threatens to convert every physical taking suffered in the course of a legitimate business into a "condition" that is immune from the per se standard.

1. *Nollan* and *Dolan* Do Not Apply Here Because One Cannot Assume the Government Could Constitutionally Terminate the Hornes' Raisin Business

In this case, the government cannot and has not shown that it could legitimately prohibit the Hornes' business activities—the activities which the Order allegedly "conditions." 483 U.S. at 836-37. The Takings Clause[4] and Equal Protection Clause[5] would constrain the government's ability to order the Hornes to cease selling raisins, thereby destroying their business and the productive use of their land, to fix a raisin supply problem. *See id.* at 835 n.4 ("If the Nollans were being singled out to bear the burden of California's attempt to remedy [beach access problems], although they had not contributed to it more than other coastal landowners, the State's action,

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[4] *See Lucas*, 505 U.S. at 1017-19 (regulations depriving a property owner of economic use of property are unconstitutional without just compensation); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950) (government activities that took away property rights in water historically used for cattle grazing caused a taking).

[5] *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (A "class of one" equal protection violation arises where the government "intentionally treated [a property owner] differently from others similarly situated and that there is no rational basis for the difference in treatment.").

even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause."). At the least, unlike in *Nollan*, there is no basis for the Court to assume that the government could constitutionally terminate the Hornes' business, and that the "essential nexus" test controls for that reason. This is particularly so where the government has never argued it has constitutional power to close the Hornes' business, and no lower court has addressed the issue.

Consequently, the fundamental predicate for the application of the "essential nexus" inquiry does not exist here. This means that the exaction of property from the Hornes must be reviewed on its own terms under the default takings framework. *See, e.g.*, *Loretto*, 458 U.S. at 438-39 (considering whether a regulation requiring installation of a cable box for tenant use was a taking without respect to the property owner's rental of the property). That is, the fact that the government's demand for the Hornes' property occurs in connection with their desire to sell produce is immaterial in terms of the standards to be applied. The Order is not a set of "conditions" within the purview of *Nollan* and *Dolan*, but simply a mandate to transfer the Hornes' property to the government. Such a taking has always been analyzed for constitutionality under this Court's physical takings precedents.

2. The Ninth Circuit's Rationale Would Wrongly Turn Every Physical Taking Into a "Condition" Reviewed Under *Nollan* and *Dolan* Rather Than the Traditional Per Se Test

The Ninth Circuit's treatment of the Order as a "condition" on the Hornes' desire to sell raisins—one that triggers *Nollan*—is not only wrong because it is inconsistent with *Nollan*, but also because this logic would eviscerate physical takings jurisprudence. Consider *Loretto*, the seminal physical takings case. There, the government authorized attachment of a cable box to Ms. Loretto's apartment building. This Court had little trouble finding this to be a per se taking. 458 U.S. at 435-38. But under the Ninth Circuit's reasoning, the same imposition would likely be cast as a mere "condition" on Ms. Loretto's "choice" to rent property. *Horne*, 750 F.3d at 1143. As such, it would be weighed under the less demanding *Nollan/Dolan* tests. *Id.*

The same analytical transformation is possible in every physical takings case this Court has considered. In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Court held the taking of interest on client funds to be a per se physical taking. *Id.* at 235. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held the taking of interest on court-deposited funds to be per se unconstitutional. *Id.* at 164. Under the Ninth Circuit's rationale, both of these takings would be treated a condition on use of the legal system—one that is subject to the essential nexus and proportionality tests, rather than physical takings law. The taking of a public easement in *Kaiser*

Aetna? It would be a "condition" on the election to build near federal waters and treated as a *Nollan* issue rather than as a per se taking of the right to exclude strangers.[6]

Thus, taken to its logical conclusion, the Ninth Circuit's decision to treat the Order in this case as a "condition"subject to *Nollan* and *Dolan* rather than as a physical taking would render this Court's per se, physical takings framework a nullity. This cannot be correct.[7] *Nollan* and *Dolan* do not override established takings tests in this case just because the taking of the Hornes' property can be creatively cast as a condition on their choice to engage in a regulated business activity.

This case thus boils down to the relatively simple question of whether the requirements of the Order—standing alone—fail traditional takings tests. This Court's physical takings jurisprudence clearly says "yes." The appropriation of personal property is a physical, per se taking. *Kimball Laundry*, 338 U.S. at 7. So is the confiscation of money when it is connected to an identifiable property interest—like the Hornes' raisin business and/or their farmed land. *Koontz*, 133 S. Ct. at 2599. Therefore, with the Ninth Circuit's use of *Nollan* and *Dolan* properly out of the

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[6] *See Kaiser Aetna*, 444 U.S. at 180-81.

[7] Indeed, in *Loretto*, the Court faced the characterization of the physical taking in that case as a "condition" on the rental use of property, an argument intended to provoke a more lenient takings standard. *See Loretto*, 458 U.S. at 438-39. Yet, the Court rejected this argument and applied a per se takings analysis. *Id.* at 439 & n.17.

equation, it is clear that the Order unconstitutionally takes the Hornes' property.

II

WHEN APPLICABLE, *NOLLAN* AND *DOLAN* REQUIRE THE GOVERNMENT TO SHOW THAT THE REGULATED PROPERTY USE DIRECTLY CAUSES THE NEED FOR THE PARTICULAR TYPE AND DEGREE OF EXACTION IMPOSED

Nollan and *Dolan* do not apply here. But it is important to recognize that the Ninth Circuit not only failed to ascertain the limited reach of *Nollan* and *Dolan*, it also badly misunderstood the nature of the "essential nexus" and "rough proportionality" inquiry. The lower court applied that inquiry as if it only tests whether a purported property use condition serves the government's regulatory ends. *Horne*, 750 F.3d at 1143-44. This is not a proper interpretation. Indeed, it leaves out the most unique—and often dispositive—aspect of *Nollan* and *Dolan*.

It only takes a cursory reading of the decision below to see that the Ninth Circuit views *Nollan* and *Dolan* as requiring nothing more than a means-ends analysis. *See, e.g.*, *Horne*, 750 F.3d at 1143 ("We now turn to the nexus requirement and ask if the reserve program 'further[s] the end advanced as [its] justification.'" (quoting *Nollan*, 483 U.S. at 837)); *id.* at 1144 ("There is a sufficient nexus between the means and the ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional . to Congress's stated goal of ensuring an orderly domestic raising market."). Under the

Ninth Circuit's view, as long as the exaction at issue (the requirement to dedicate raisins) furthers the government's purpose in imposing the exaction (an "orderly domestic raisin market"), *Nollan* and *Dolan* are satisfied. *Id.*

But the "essential nexus" and "rough proportionality" tests have never simply been a rational basis test by another name. As *Koontz* explains, under *Nollan/Dolan*, the government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between *the property that the government demands and the social costs of the applicant's proposal.*" 133 S. Ct. at 2595 (emphasis added). The core of the "essential nexus" test is not whether an exaction serves a legitimate government goal, but whether the regulated property use *causes* the problem an exaction mitigates.[8] *Id.*; *see also*

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[8] Commentators have long recognized the role of causation in the *Nollan/Dolan* tests. *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277, 281 (2011) (In *Nollan*, "the state did not meet its burden of proving that a condition requiring a beach access pathway bore an 'essential nexus' to the impacts caused by the development."); Pierson Andrews, *Nollan and Dolan: Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees*, 25 BYU J. Pub. L. 143, 146 (2011) ("In *Nollan*, the United States Supreme Court concentrated on the connection between the exaction required by the government and the burden imposed by the new development."); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 378 (2002) ("*Nollan* established that an 'essential nexus' must exist between a development condition and the amelioration of a legitimate public problem arising from the development."); James E. Holloway & Donald C. Guy, *Land*

(continued...)

Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land use regulation is valid because there exists "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy"). *Dolan* confirms this by requiring the government to show that the regulated property use also causes the need for the type and *degree* of exaction. *Dolan*, 512 U.S. at 391 (government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development").

The Court struck down the beach easement in *Nollan* because the Commission failed to show it would "remedy any additional congestion on [the beach] *caused by construction* of the Nollans' new house." 483 U.S. at 838-39 (emphasis added). Similarly, the *Dolan* Court struck down the floodway easement imposed on Ms. Dolan because the expansion of her hardware store—and its potential to increase water runoff in a flood plain area—did not cause a need for public

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[8] (...continued)
Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause, 27 Tex. Tech L. Rev. 73, 96 (1996) ("*Nollan*'s essential nexus test requires the government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development"); Brian T. Hodges & Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle? Citizens' Alliance for Property Rights v. Sims*, 40 Envtl. L. 829, 829 (2010) ("The essential nexus test requires the government to establish a cause-and-effect connection between development and an identified public problem before placing conditions on development.").

ownership of the easement area. 512 U.S. at 394-95 ("[T]he findings upon which the city relies do not show the required reasonable relationship [rough proportionality] between the floodplain easement and the petitioner's proposed new building."); *id.* at 393 ("But the city demanded more [than an open space restriction to address run-off concerns]—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system.").

Here, however, the Ninth Circuit's version of *Nollan* and *Dolan* totally fails to ask whether there is a direct and proportionate link between the regulated property use and exaction. *Horne*, 750 F.3d at 1143 ("By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions."). If *Nollan* and *Dolan* were applicable here (they are not), the Ninth Circuit would have to ask whether (1) the Hornes' business caused the problem the confiscation of their raisins is supposed to mitigate, and if so, (2) whether the government has made an individualized determination that the raisin exaction is roughly proportionate in nature and degree (amount) to the social problem allegedly arising from the Hornes' activities. *Koontz*, 133 S. Ct. at 2595.

In bypassing this analysis, the Ninth Circuit converted *Nollan* and *Dolan* from a robust, cause-and-effect standard into a weak due process-type test. There is no basis for this in the Court's precedent. In fact, this Court has already rejected such a construction. *Dolan*, 512 U.S. at 391. Therefore, in clarifying that *Nollan* and *Dolan* do not apply here, the

Court should also repudiate the Ninth Circuit's understanding of the *Nollan/Dolan* tests, lest other lower courts follow it.[9]

CONCLUSION

The Court should reverse the Ninth Circuit's decision.

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Respectfully submitted,

*J. DAVID BREEMER
Counsel of Record
JAMES S. BURLING
JENNIFER F. THOMPSON
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

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[9] Amicus declines to engage in a complete analysis of this case under a correct version of the "essential nexus" and "rough proportionality" tests because *Nollan* and *Dolan* simply do not control. However, Amicus notes that the government never made an "individualized determination" that the amount and type of property taken from the Hornes is proportional to their particular impact on the raisin market, *Dolan*, 512 U.S. at 391, nor did it establish this point in proceedings below.